19 (4)

No. 08-833

Supreme Court, U.S.
FILED
FEB 4 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KHRISTIAN OLIVER,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICI CURIAE

Amici curiae are law professors at law schools located in the United States.[1] Amici include con-

[1] Pursuant to Rule 37.6, Amicus Curiae certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae made a monetary contribution to its preparation or submissions. Pursuant to Rule 37.2(a), counsel of record for both petitioners and respondents were notified of the intent to file this brief at least 10 days prior to the filing of this

stitutional law professors, criminal law professors, and professors that have authored articles on the issues involved in the Petitioner's case.[2] As law professors, amici have an interest in the development of constitutional and criminal jurisprudence. Amici file this brief in support of the Petition for a Writ of Certiorari to address the important constitutional issues present in this case, namely a capital jury's reliance on a religious text, the Bible, in sentencing the Petitioner to the death penalty.

INTRODUCTION

On December 25, 2019, a jury in Utopia recommended that a murderer be sentenced to life in prison without parole. The jury had the option of recommending death, but recommended life without parole after consulting Section 2267 of the Catechism of the Catholic Church, which states, on part:

> If . . . non-lethal means are sufficient to defend and protect people's safety from the aggressor,

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brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] Specifically Professor John Blume, Director of the Cornell Death Penalty Project, Professor of Law, Cornell Law School; Professor Stephen P. Garvey, Associate Dean for Academic Affairs, Professor of Law, Cornell Law School; Professor Lawrence C. Marshall, Professor of Law, David and Stephanie Mills Director of Education, and Associate Dean for Public Interest and Clinical Education, Stanford Law School; Professor Geraldine Szott Moohr, Alumnae Professor of Law, University of Houston Law Center; Professor Donald North, Associate Professor of Law, Clinical Education Program Director, Southern University Law Center; Professor Elisabeth Semel, Director of the Berkeley Law Death Penalty Clinic, Clinical Professor of Law, University of California, Berkeley, School of Law; and Professor Yolanda Vazquez, Clinical Supervisor and Lecturer, University of Pennsylvania Law School.

> authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm – without definitely taking away from him the possibility of redeeming himself – the cases in which the execution of the offender is an absolute necessity are very rare, if not practically nonexistent.

Following the sentencing, five of the jurors admitted reviewing Section 2267 of the Catechism during deliberations. A post-conviction hearing ensued but, in light of an evidentiary rule that forbade inquiry into the juror's deliberative process, the evidence was limited to the question of what the jurors reviewed. Nonetheless, the trial judge ruled that the jury's consultation with official exposition of the teachings of the Roman Catholic Church during capital sentencing deliberations did not effect its deliberations.

The scenario described above did not occur, but the parallels with the facts of this case are genuine.

FACTUAL BACKGROUND

A jury in Nacogdoches County, Texas convicted Petitioner of capital murder on April 20, 1999. 34a. Petitioner shot his victim and then struck him in the head with the stock of a rifle. 33a. The forensic evidence presented at trial was unclear as to whether the gunshots or the blow to the head was the cause of death. 2a. During closing arguments, the prosecutor argued that the Petitioner deserved the death penalty for striking his victim with the rifle. 149a-

150a. Prior to its deliberations as to guilt, the court instructed the jury "not to refer to or discuss any matter or issue not in evidence before you. . . ." 29a.

After being sentenced to death, Petitioner learned that during sentencing deliberations, the jury consulted, discussed, read aloud and relied upon certain biblical passages in reaching their decision. Among the passages discussed was Numbers 35:16-19, which states in part:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.
>
> . . .
>
> Or, if he smite him with an hand weapon of wood, wherewith he may die, he is a murderer: the murderer shall surely be put to death.

3a-4a n.3.

Petitioner filed a motion for a new trial and, on June 25, 1999, the state trial court held a hearing concerning the external influence of the Bible on the jury. 70a. The state court allowed the jurors to testify about whether they consulted external material, but declined to allow questioning or testimony on the effect of that external influence on their deliberations. 76a-90a; 130a; 131a. As the trial judge stated: "[W]e have to be very careful about avoiding [questions concerning] the effect [the Bible] had upon any juror, if any. . . ." 130a.

Four jurors testified at the hearing and their testimony confirmed that they consulted the Bible during the sentencing deliberations. Specifically, they consulted more than one Bible, read the Bible aloud, shared copies of a highlighted Bible, and

considered the above-quoted passage from the Book of Numbers about a "murderer" being "put to death" for smiting someone "with an instrument of iron" or a "weapon of wood." 135a-155a, 166a, 177a, 189a-192a. Nonetheless, the trial court denied Petitioner's motion for a new trial, finding that the jury "rendered their verdict in accord with the evidence they heard in this case *uninfluenced by any outside influence of any kind. . . .*' 234a (emphasis added).

Petitioner next exhausted his state court remedies, then pursued a habeas corpus petition in federal court. 6a. Petitioner's habeas claims at the state and federal levels were, in part, based on newly discovered evidence that one of the jurors, who had not testified at the hearing, gave a tape recorded interview to a journalist about the jury's Bible consultations. 6a; 47a. This juror confirmed that the jury had consulted the Bible during sentencing deliberations, stating: "We brought one right in there with us." 310a. The juror also confirmed that the jury used the Bible *before* reaching a decision, stating that the Bible consultation was:

> [l]ong before we ever reached a verdict. This was not support after the fact; this was – this was during the deliberation phase, the discussion phase inside. So it was – it had nothing to do with pre-judgment.

329a.

The juror also disclosed that:

> most of us there, about 80 percent, brought scripture into the deliberation as well as the solace from that scripture. "Are we making the right decision?" *"Is this the way the Lord would decide this case?"* This particular case, not

> unilaterally but this particular case. Given the evidence, given everything we've been presented.

328a-29a (emphasis added).

And:

> We were given the list of judgment possibilities by Judge Pierce (phonetic). And based on that, we made our determination of, how should this be judged? And what can we, in our minds and in our spirits, reconcile? And it was through the biblical principles, then, that we utilized that to say, yes, this is the only way – the only we that we can bring down the judgment and our recommendation . . . .

307a-308a.[3]

Notwithstanding the inconsistency between the state court's refusal to allow evidence concerning "the effect [the Bible] had upon any juror," the jurors' testimony and interview specifically acknowledging their use of the Bible, and the Fifth Circuit's own conclusion that "the jury's use of the Bible here amounts to a type of 'private communication, contact, or tampering' that is outside the evidence and law," the Fifth Circuit accepted the state court's determination that there was no "outside influence of any kind." 23a (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)); 130a.

The Fifth Circuit never acknowledged the state court's preclusion of all evidence concerning the Bible's effect on the jury but nonetheless deferred to

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[3] The same juror stated that "when the civil law comes into direct conflict with biblical law, the biblical law will be the one that prevails" and that he does not "agree with separation of church and state." 304a; 314a.

its "findings." Stating that "[i]n essence, the state court made a finding that the Bible did not prejudice the jury's decision," the court presumed that those findings were correct. 27a. The Fifth Circuit's opinion provided no indication that it was cognizant of or considered the state court's refusal to consider evidence concerning "the effect [the Bible] had upon any juror. . . ." 130a.

Once it deferred to the state court's finding, the Fifth Circuit interpreted 28 U.S.C.§ 2254(e)(1) to require that Petitioner present "clear and convincing" evidence that the state court was incorrect. 27a. The Fifth Circuit concluded that Petitioner did not meet this burden. 27a-30a.

SUMMARY OF THE ARGUMENT

Petitioner's case raises fundamental questions about constitutional protections afforded to convicted persons facing a death sentence. Petitioner's First and Sixth Amendment rights were violated in this case when the capital jury charged with making decisions that would determine whether or not he received the death penalty consulted and relied upon a Bible during sentencing deliberations.

Federal circuit courts are split over what standard of review is appropriate when a jury violates a defendant's Sixth Amendment rights by consulting the Bible. The Fifth Circuit here erroneously deferred to the trial court's purported factual finding in denying the habeas petition. The court applied the wrong standard, however, because a capital jury's consultation with a religious text during deliberations is a structural defect in the trial. It was an external influence that pervaded the decision-making process and must be evaluated as presumptively prejudicial.

Even if this constitutional error was a trial type error, courts should be instructed to apply the "substantial and injurious effect" standard. The Court should grant the Petition for Writ of Certiorari in order to resolve the circuit split over which standard is appropriate for evaluating this type of constitutional errors on collateral review.

The capital jury's reliance on the Bible in this case also violated the First Amendment's Establishment Clause. A capital jury, charged with making decisions that lead to the most serious and irrevocable state action – the imposition of death – is a state actor for purposes of determining whether the Establishment Clause has been violated. In Petitioner's case, the capital jury's reliance on the Bible during sentencing served no secular purpose, had the primary effect of advancing religion, and fostered an excessive government entanglement with religion by essentially giving a biblical mandate the force of law which lead to Petitioner's death sentence. The Court should grant the Petition for Writ of Certiorari here in order to decide whether a capital jury's reliance on a religious text when recommending a death sentence violates the First Amendment's Establishment Clause.

ARGUMENT

I. This Case Presents An Important Constitutional Question About Which Federal Courts of Appeals Are Divided: Whether Consultation of a Bible by a Capital Sentencing Jury is a Structural Defect in the Trial Mechanism that is Presumptively Prejudicial on Habeas Review.

The Fifth Circuit held in this case that the jury's consultation of the Bible violated the Sixth Amendment, in accordance with this Court's precedents prohibiting external influences on a criminal jury. 21a. *Oliver v. Quarterman*, 541 F.3d 329, 334-40 (5th Cir. 2008) (citing *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Mattox v. United States*, 146 U.S. 140, 149 (1892)). The court noted that "here, several jurors collectively consulted a Bible, in the jury room, and likely compared the facts of this case to the passage that teaches that capital punishment is appropriate for a person who strikes another over the head with an object and causes the person's death." 23a. *Oliver*, 541 F.3d at 340. Going further, the Fifth Circuit held that the "jury's use of the Bible here amounts to the type of 'private communication, contact, or tampering' that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe." *Id.* (citations omitted). However the court then deferred to the state court's finding that the biblical consultation did not effect the jury's decision and concluded that this Sixth Amendment error was not reversible. 27a. *Oliver*, 541 F.3d at 342.

Rather than assessing the prejudicial impact of the constitutional error below, the Fifth Circuit interpreted 28 U.S.C. § 2254(e)(1) to require deference to factual findings made by the state court unless Petitioner presented clear and convincing evidence to "rebut the presumption of correctness that we must afford to the state court's factual finding." 27a-30a. Indeed, the Fifth Circuit concluded that it was bound by the state court's factual finding regarding the non-effect of the Bible on the jury and this conclusion led it to determine that the constitutional error was not reversible error under 28 U.S.C. § 2254(e)(1). 27a. *Oliver*, 541 F.3d at 342. That conclusion is inconsistent with this Court's directive that "in § 2254 proceedings a court *must* assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht*." *Fry v. Plileri*, 551 U.S. 112, 127 S.Ct. 2321, 2328 (2007) (emphasis added).

When reviewing constitutional issues raised in a habeas petition, courts must apply the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Federal circuit courts are split in their opinion of how *Brecht* applies in cases involving improper influence on a capital jury resulting from consultation of the Bible during deliberations. *Compare Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007), *cert. denied, Fields v. Ayers*, 128 S.Ct. 1875 (2008), *with McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005). This case squarely presents an opportunity for the Court to establish the appropriate standard of review in habeas cases where a capital jury improperly consults a Bible or other religious text during sentencing deliberations.

A. The Jury's Consultation of the Bible During Capital Sentencing Deliberations Was a Structural Defect and Should Have Been Reviewed as Presumptively Prejudicial.

As the Court established in *Brecht* and reaffirmed in *Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321 (2007), the appropriate standard of review in considering most habeas petitions is whether than error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See Fry*, 127 S.Ct. at 2327. This standard, however, is appropriate when reviewing "trial errors" that occur "'during the presentation of the case to the jury,' [that] 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect the error had on the trial].'" *Brecht*, 507 U.S. at 629 (quoting *Arizona v. Fulimante*, 499 U.S. 279, 307-08 (1991)). However, as the Court has recognized, some constitutional errors are "structural defects," or more serious errors which occur "in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," and are thus presumptively prejudicial. *Brecht*, 507 U.S. at 629 (citing *Fulimante*, 499 U.S. at 309).

The Fifth Circuit correctly concluded that the jury's use of the Bible was an impermissible external influence that violated the Sixth Amendment. 23a. *Oliver*, 541 F.3d at 340. The appropriate standard of review for this type of collateral challenge is the presumptively prejudicial standard recognized by *Brecht*. The type of error involved in this case – a Sixth Amendment violation based on a jury's impro-

per reliance on an external influence, here a religious text, during capital sentencing deliberations – should be evaluated under the heightened presumptively prejudicial standard.

The Court recognized in *Remmer* that an impermissible external influence on criminal jury deliberations relating to "the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial*." 347 U.S. 227, 229 (1954) (emphasis added). The jury's consultation of the Bible when deliberating about the death penalty is presumptively prejudicial because it was an unconstitutional external influence that "infect[ed] the entire trial process." *Brecht*, 507 U.S. at 629-30. The error here did not occur during the presentation of the case to the jury and therefore cannot be quantitatively assessed in the context of the other evidence at trial, as "trial errors" sometimes can. *See Brecht*, 507 U.S. at 629. It is nearly "impossible to analyze in terms of harmless error" the effect of jury's consultation with the Bible during deliberations.[4] *See, e.g., Fulimante*, 499 U.S. at 291 (discussing the need for the presumptively prejudicial standard for structural errors).

Further, the evidentiary rules at issue restricted the trial court's ability to probe the prejudicial effect of the improper external influence on the jury. *See*

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[4] As discussed, *supra*, there is sufficient evidence in this case to find that the jury did in fact rely on the Bible during sentencing deliberations, but that is not usually the case. Nonetheless, this does not detract from the seriousness of the error and the need for a presumptively prejudicial standard in these types of cases.

Fed. R. Evid. 606(b), Tex. R. Evid. 606(b).[5] The recognized need to protect the privacy of a jury's decision-making however should not be elevated over a criminal defendant's Sixth Amendment rights. The conflicting demands of Texas Rule of Evidence 606(b) and the Court's directive in *Fry* that reviewing courts "must assess the prejudicial impact of constitutional error" has resulted in an untenable situation. The jury was improperly influenced by a Bible in reaching a determination that led to a death sentence and the improper influence was recognized as constitutional error, but the reviewing court decided that it could do nothing in light of the trial court's findings, which did not explore the effect of the unconstitutional influence due to the evidentiary rule. Application of the presumptively prejudicial standard is necessary to address this inherent conflict while allowing for review of structural defects in a way that protects both of these important interests of the criminal justice system – the jury's right not to have anyone questioning their deliberations and a defendant's right to be tried by a jury free of improper external influence. This standard would only apply once a

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[5] TEX. R. EVID. 606(b), states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

constitutional violation has been established, so its scope would necessarily be limited.

Put into context, a jury's unconstitutional consultation of a religious text during sentencing deliberations in a capital case is a structural defect that is akin to having the the case tried before a biased judge, which the Court has long recognized as being subject to a presumptively prejudicial analysis. *See Fulimante*, 499 U.S. at 290, 294 (citing *Turney v. Ohio*, 273 U.S. 510, 535 (1927)). The stage of the proceeding is particularly important here as guilt had already been determined beyond a reasonable doubt. The only remaining issue for the jury in deliberations was whether or not Petitioner's conduct satisfied the criteria for the death penalty. To make that determination, the jury consulted the biblical passages concerning the propriety of imposing capital punishment on someone who commits murder with a metal object, just as Petitioner had done. Post-conviction testimony and recorded statements of jurors, combined with the questions that the jury was charged with answering, support the firm conclusion that the jurors consulted the Bible to determine whether Petitioner deserved to be sentenced to death. The passages cited provide a holy justification for imposing the death penalty in certain circumstances. Indeed, the most plausible explanation as to why jurors consulted passages about the propriety of putting those who commit murder with metal weapons to death is that the jury was trying to determine, as instructed by the trial court, whether there were mitigating factors that would warrant life in prison rather than the death penalty. 347a-348a. There can be little doubt that the biblical passages improperly influenced the jury's decision that such mitigating circumstances did not exist. For example,

one juror described the consultation of biblical passages as answering the question, "Is this the way the Lord would decide this case?" 328a. Moreover, the cited passages from the Book of Numbers state plainly that a murderer who kills with a weapon of iron or wood deserves the death penalty. Thus, it is readily apparent that the jury was consulting the Bible to determine the propriety of ending Mr. Oliver's life – an outcome the jury knew would ensue if they answered the judge's questions a certain way. 347a-348a

Similar to this capital jury's reliance on biblical text, a judge's bias would infect the fundamental fairness of the entire proceedings. Both types of error "str[ike] at fundamental values of our society and 'undermine[] the structural integrity of the criminal tribunal itself, and [are] not amenable to harmless-error review.'" *Fulimante*, 499 U.S. at 294 (citing *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986)).

The Eleventh Circuit has held that a juror's contact with extrinsic evidence during the course of a trial gives rise to a presumption of prejudice. *McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005). The Eleventh Circuit reasoned: "Under federal law, any evidence that does not 'come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel' is presumptively prejudicial." *Id.* at 1307. The court went on to note that once a defendant shows that there was an impermissible external influence on the jury, "the State bears the burden of rebutting the presumption by showing that the jurors' consideration of the extrinsic evidence was harmless to the defendant." *Id.*

The Eleventh Circuit applied the appropriate standard in reviewing this type of error. A capital jury's consultation of the Bible during sentencing deliberations undermines the fundamental fairness of a criminal proceeding, is presumptively prejudicial, and not amenable to the "substantial and injurious effect or influence" standard in light of the conflicting demands of evidentiary rules that protect the privacy of jury deliberations. *See Brecht*, 507 U.S. at 623; *see also,* Fed. R. Evid. 606(b); Tex. R. Evid. 606(b). Only a presumptively prejudicial standard can adequately ensure the constitutional protection afforded by the Sixth Amendment in these circumstances.

B. Even If The Jury's Consultation of the Bible in This Case Was Not A Structural Defect, It was a Trial Error that Must Be Evaluated for "Substantial and Injurious Effect."

If the Court concludes that the jury's consultation of the Bible was a trial error and not a structural defect, it should still have been evaluated pursuant to the "substantial and injurious effect or influence" standard rather than the Fifth Circuit's erroneous requirement that the Petitioner present clear and convincing evidence to rebut a presumption of correctness of the state court's findings. *See Fry*, 127 S. Ct. at 2325, 2328; *Brecht*, 507 U.S. at 623; *Kotteakos*, 328 U.S. at 776. This standard requires that a court grant a habeas petition where a petitioner shows that the constitutional error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. The Ninth Circuit, on the other side of the federal circuit split, applied the "substantial and injurious effect or influence" *Brecht* standard where

the jury used biblical quotations in the penalty phase of a capital trial. *Fields*, 503 F.3d at 776, 781.

If the Court determines that "substantial and injurious effect or influence" review is appropriate under the circumstances of this case, the Fifth Circuit's opinion must be reversed because it relied on 28 U.S.C. § 2254 and applied the wrong standard. The Fifth Circuit denied Petitioner's habeas petition because "the state court made a factual finding regarding the effect of the Bible on the jury" and the court held that it "must defer to that factual finding unless Oliver presented 'clear and convincing' evidence to the contrary." 27a; *Oliver*, 541 F.3d at 342 (citing 28 U.S.C. § 2254(e)(1)).

While 28 U.S.C. § 2254 instructs courts to defer to the factual findings of a trial court, it also states that a court may grant a habeas petition where there was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(2). Here, there was no evidence to support the state court's factual finding that the jury's consultation of the Bible had no prejudicial effect on its sentencing deliberations because the trial court refused to consider the effect of the biblical consultation. 74a-76a; 130a-131a; 134a-135a; 166a-167a; 182a-183a. In accordance with Texas Rule of Evidence 606, the trial court specifically excluded any evidence about the effect that the Bible consultation had on the jurors. 129a-130b. As a result, the trial court's factual finding was unsupported in the record and an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(2). The Fifth Circuit erred in relying upon

that purported factual determination to deny the habeas petition.

The Fifth Circuit should have applied the *Brecht* standard of review for structural defects, i.e., presumptively prejudicial. The court should have recognized that the type of error in this case was presumptively prejudicial and thus reversible. In the alternative, the court should have granted the habeas petition under the "substantial or injurious effect" *Brecht* standard dicated by *Fry*, as the record showed that the jury's reliance on the Bible during deliberations had a substantial and injurious effect on the jury's sentencing deliberations. At a minimum, the Fifth Circuit should have assessed the prejudicial impact on its own, rather than deferring to the state court, which concluded that there was no effect after not allowing the jury to answer questions about the effect of the Bible on its deliberations.

Federal circuits are split over which of these standards should be applied to review the effect of a jury's consultation of religious texts during deliberations, and the Court should take this opportunity to clarify which of these standards is proper under the circumstances.

II. THE JURY'S CONSULTATION OF THE BIBLE DURING CAPITAL SENTENCING DELIBERATIONS VIOLATED THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE.

The jury's conduct in this case violated the defendant's constitutional protection against state establishment of religion. The victim in this case died from either a gunshot wound or from being hit in the head with the stock of a rifle. 2a During sentencing

deliberations, the jury consulted the Bible with respect to the appropriate punishment for the specific acts involved here: murder with a metal weapon or a weapon of wood. The specific biblical verses consulted included:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.
>
> . . .
>
> Or if he smite him with an hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.

3a-4a (quoting Book of Numbers 35:16 (King James)); *see also* 154a-155a). A juror also admitted that the jury "used the scripture to lend support for or against particular views." 331a. Thus, the jury in this case relied upon an improper external influence when deciding whether or not to recommend the death penalty, and that reliance is tantamount to an unconstitutional establishment of religion.

A. A Jury Is A State Actor and Must Be Subject To The Lemon Test On Whether They Violated the Petitioner's Establishment Clause Rights.

The First Amendment directs that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. The Establishment Clause is not limited to Congress, with its application extending to state actors. Courts have recognized a wide range of state actors, including an athletic association, school officials, and even doctors treating prison inmates. *Tenn. Secondary School Athletic Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2493

(2007); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *West v. Atkins*, 487 U.S. 42, 55 (1988). In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991), Justice Kennedy stated that a judge is "beyond all question" a state actor.

Likewise, a jury is also a state actor.[6] "The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination." *Id.* Jury service is compulsory and juries take direction only from the judge; they are compensated by the state. Moreover, the right to a jury in a criminal trial is a constitutional right, granted to all criminal defendants subject to a felony conviction by the government. U.S. Const. amend VI. Further, a capital sentencing jury administers the most serious sanction that the state can impose on one of its citizens – death.

It is no great leap of faith, therefore, to treat a capital sentencing jury as a state actor. The jury assumes the power of the state and jurors receive privileges and immunities reserved for governmental actors. *See* Terrence T. Egland, *Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations*, 16 Cap. Def. J. 337, at 359-60 (2004). *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (calling a jury a "governmental body").

The Court, in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), determined that the Establishment Clause "was intended to afford protection [against]: 'sponsorship, financial support, and active involve-

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[6] The trial judge in this case even stated that he was the "sole juror," recognizing that he was serving in the jury's capacity when making a post-trial decision as to Petitioner's fate. 149a.

ment of the sovereign in religion activity.'" *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). The *Lemon* test, while traditionally used to determine legislative legality, can serve as a useful barometer in examining constitutionality of other state actions.[7] In this case, the capital sentencing jury represents the sovereign, charged with determining the life or death of the accused.

In order to abide by the Establishment Clause a jury's actions need a secular purpose; the "principal or primary effect [of the action] must be one that neither advances nor inhibits religion;" and a jury's actions "must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (citations omitted). *See* Gary J. Simson and Stephen P. Garvey, *Knockin' On Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 Cornell L. Rev. 1090, 1120-29 (2001). Here, however, the jury that recommended the death penalty violated the Establishment Clause when it utilized a Bible to determine the propriety of the death penalty for a specific crime.

B. The Jury's Bible Consultation Violated the Establishment Clause.

A jury's consultation of the Bible during capital sentencing determinations serves no secular purpose. As in this case, juries in other death penalty cases have relied improperly upon the Bible to determine whether a death sentence is appropriate. *See, e.g.*,

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[7] Although several Justices have criticized the *Lemon* test, amici offer its use an approximation for determining a violation of the Establishment Clause. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia J. dissenting).

Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989); *Colorado v. Harlan*, 109 P.3d 616 (Colo. 2005); Egland, *supra*, at 361. While courts have postulated whether or not the use of the Bible constitutes harmless error, none of the cases have ever stated that the Bible served a secular purpose. Courts have called the Bible "an authoritative religious document," far from an endorsement of a secular purpose. *Jones*, 706 F. Supp. at 1559. The Fifth Circuit held that the jury's use of Bible verses "during the sentencing phase of the trial amounted to an external influence." 21a. *Oliver*, 541 F.3d at 340. The Fifth Circuit referenced the First, Sixth, and Ninth Circuits, noting that both the First and the Sixth Circuits considered the Bible to be an improper external influence when present in the jury room, while the Ninth Circuit never reached the question. 16a-18a. *Id.* at 337-38.

A jury's reliance on the Bible when deliberating the possible imposition of the death penalty is an unconstitutional establishment of a religious creed by the State, in the form of a jury as a state actor. Reliance on the edicts of the Bible, or any other religious text, improperly uses religion to assist with a death penalty determination. One juror explicitly stated, "the biblical law will be the one that prevails. And that's the way I judge . . . ." 304a. He even asked himself "is this the way the Lord would decide the case?" 327a. This reliance on the teachings of the Bible, an improper external influence, unconstitutionally established religion in the jury room of the petitioner.

A jury's consultation of the Bible during sentencing deliberations also comprises government entanglement with religion by promotion of "a fusion of

governmental and religious functions that violates the Establishment Clause." Egland, *supra*, at 361. In the sentencing phase of the petitioner's case, the jurors admitted to having at least one Bible in the jury room, and expanded their sentencing deliberation to include specific verses of the Bible. As one juror stated, "I was reading out of [another juror's] Bible. After I read it, I think one more person read out of her [Bible]. . . . And this is what I recall, [another juror] being back there and reading out of a Bible, and then seeing us read out of a Bible and wanting to know what we were reading." 151a. Another juror stated that "most of us there, about 80 percent, brought scripture in the deliberation. . . ." 327a. This "fusion" of the courtroom evidence and religious text produces the very entanglement of government and religion that the Establishment Clause intended to prevent.

The First Amendment's Establishment Clause issue presented by this case does not turn on consultation of the Bible. Whether the religious text used by a capital sentencing jury was the Qur'an, which might support imposition of the death penalty, *see Fields*, 503 F.3d at 785 (Gould, J., dissenting in part and concurring in part), a Mennonite guide or Catholic Catechisms, both of which oppose the death penalty, the issue is whether a jury's resort to an improper external influence that happens to consist of religious teachings on the issue at hand comprises an unconstitutional establishment of religion in violation of the First Amendment. Amici submits that it does.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court grant Mr. Oliver's Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: February 4, 2009